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JOSEPH F. SPANIOL, J
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No. 89-210

In The

Supreme Court of the United States

October Term, 1989

JIM SKINNER FORD, INC.,

Petitioner,

v.

JACK D. WARREN and JUANITA WARREN,

Respondents.

On Petition For A Writ Of Certiorari To The Alabama Supreme Court

BRIEF FOR RESPONDENTS JACK D. WARREN AND JUANITA WARREN IN OPPOSITION

WILLIAM J. TRUSSELL
Counsel of Record

Of

CHURCH, TRUSSELL & ROBINSON, P.C.
1609 Cogswell Avenue
Pell City, AL 35125
(205) 338-2295

Attorneys for Respondents, Jack D. Warren and Juanita Warren

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

1. Do the provisions of the Federal Arbitration Act, 9 U.S.C. § 1 (1982), et seq., apply to disputes arising from the purchase for consumer use of a motor vehicle pursuant to an adhesion contract by an Alabama resident from an automobile dealership with its sole place of business located in the State of Alabama?

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SUMMARY OF ARGUMENT

The Alabama Supreme Court ruling in this case is not governed by *Perry v. Thomas*, 482 U.S. 483 (1987) or *Southland v. Keating*, 465 U.S. 1 (1984). In these cases, the subject contracts evidenced a transaction involving commerce within the meaning of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (1982), hereinafter referred to as the FAA. It is a well settled principle that state law is preempted by the FAA for those disputes within its operation. However, the question presented here is whether the FAA applies to the contract at issue. The Petitioner asserts that the Alabama Supreme Court's ruling in this case conflicts with numerous federal statutes that regulate the sale of motor vehicles. The logic of this conclusion escapes the Respondent. This decision does not hold that Congress lacks the authority under the commerce clause of the Federal Constitution to pass laws to protect consumer interests in connection with the purchase of a motor vehicle. Clearly, Congress has such authority. Rather, this decision simply holds, based upon the legislative history of the Act and prior judicial decisions, that the FAA does not apply to intrastate consumer purchases. The Petitioner argues that arbitration is required under the FAA in adhesion contracts. Whether arbitration should be mandated in these type transactions which are not arms-length and bargained for provisions, is a question properly left with Congress after hearings and debates. It is unlikely that Congress would ever seriously consider passing the type of legislation advanced by Petitioner under its strained interpretation of the FAA. The denial of access to the courts for defective consumer products which would result from this construction of the

FAA constitutes a threat to the rights of every citizen. It is not a subjective application of the law to hold that these transactions are not governed by the FAA, but rather such a ruling is a reaffirmation of historical precedent.

ARGUMENT

Contrary to Petitioner's assertion, this case does not represent hostility by the Respondents or the Alabama Courts to the appropriate application of the Federal Arbitration Act. This case illustrates that the FAA is not a statute intended for general application to all contracts, but Congress limited it to specific types of agreements. Section 2 of the FAA specifically limits it to maritime transactions and to "contracts evidencing transactions involving commerce." 9 U.S.C. § 2 (1982). The term commerce is specifically defined in § 1 of the Act.[1]

The Respondents acknowledge that if the subject agreement is a contract evidencing a transaction involving commerce as that term is defined in the FAA, then due to federal preemption announced by this Court in *Southland v. Keating*, 465 U.S. 1 (1984), the Petition for

[1] 9 U.S.C. § 1(1982) provides in pertinent part: . . . "commerce", as herein defined means commerce among the several states or with foreign nations, or in any territory of the United States or in the District of Columbia or between any such territory or another or between any such territory and any state or foreign nation or between the District of Columbia and any state or territory or foreign nation but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Certiorari is due to be granted. However, the Respondents submit that the legislative history as well as the previous judicial rulings construing the Act clearly demonstrate that it does not apply to the type of transaction presently before the Court. The provisions of the FAA do not and never were intended to apply to contracts of adhesion involving the consumer purchase of a product by a citizen from one state from a retailer residing in the same state.

The Petitioners principally argue that the power of Congress to regulate interstate commerce under Article I of the Federal Constitution is identical with the statutory definition of commerce used by § 1 of the FAA. Stated differently, Petitioners assert that the phrase "contract evidencing a transaction involving commerce" under the FAA has the identical meaning as the affecting interstate commerce standard used in construing the power of Congress under Article I of the Constitution. This assertion ignores the differing legislative histories of these laws and their origins, the problems sought to be remedied, and the numerous judicial decisions construing the precise language used in the respective provisions.

To distinguish between the jurisdiction of the FAA and Congress' authority under the commerce clause of Article One, it is useful to review the legislative history of the Act. The FAA was passed by Congress in 1924. The original proposal was drafted by the American Bar Association Committee on Commerce, Trade and Commercial Law using New York State Law as a model.[2] Hearings

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[2] Hearings on S. 4213 and 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Congress, Fourth Session, page 1 through 3 (1923) (Remarks by Charles Bernheimer) hereinafter cited as Hearings on S. 4214.

were originally held by the Senate Judiciary Committee in 1923. At these hearings some members of the Senate were concerned about the application of the Act to adhesion contracts or other "take it or leave it" type arrangements.[3] The debates during these hearings revealed that the legislation was not aimed at such contracts, but was intended to empower courts to enforce arbitration clauses entered into in arms-length transactions between merchants.[4] Senator Julius Cohen, a key drafter of the legislation testified extensively at the subsequent 1924 joint Congressional hearings on the proposed bill. It was Mr. Cohen's view that the proposed legislation was not suited for all types of contractual disputes, but it was a remedy particularly useful to disputes between merchants.[5] In an article jointly authored by Senator Cohen in the Virginia Law Review in 1926, he observed:

> "Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact-quantity, quality, time of delivery, compliance with terms of payment, excuses for nonperformance, and the like. It has a place also in the determination of the simpler questions of law – the questions of law which arise out of the daily relations between merchants as to the passage of

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[3] Hearings on S. 4214, *supra*, note 2 at 9-11. See also, Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 University of Fla. L. Rev. 61, 75 (1985).

[4] Hearings on S. 4214, *supra*, note 2 at pages 9-11.

[5] Joint Hearings on S. 1005 and H.R. 646, before the Subcommittee of the Committees on the Judiciary, 68th Congress, First Session (1924).

> title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned."[6]

Early disputes involving the FAA dealt with the type transactions in which Congress was primarily concerned when the legislation was adopted. Most of the reported cases did not attempt to define the phrase "contract evidencing a transaction involving commerce" other than to determine whether the facts then before the court satisfied this requirement. These decisions concerned disputes arising out of contracts between citizens of different states involving the shipment of goods through interstate commerce or concerned construction contracts where much of the material was shipped through interstate commerce.[7] In these cases the courts had little difficulty in finding that sufficient interstate commerce was involved so as to cause the claims to come within the purview of the FAA.

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[6] Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926).

[7] The following cases have dealt with interstate shipment of goods by merchants: *Krauss Bros. Lumber Co. v. Lewis Bossert & Sons, Inc.*, 62 F. 2d 1004 (2nd Cir., 1933); *Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp.*, 70 F. 2d 297 (2nd Cir., 1934), cert. granted, 293 U.S. 541, aff'd., 293 U.S. 449 (1934); *Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2nd Cir., 1959), cert. dismissed, 364 U.S. 801 (1960); *Kanmak E. Mills v. Society Brand Hat Co.*, 236 F. 2d 240 (8th Cir., 1956), *Standard Magnesium Corp. v. Fuchs*, 251 F. 2d 455 (10th Cir., 1957). The following cases dealt with construction contracts: *Lawson Fabrics, Inc. v. Akzona, Inc.*, 355 F. Supp. 1146 (S.D. N.Y., 1973),

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Eventually, this Court determined that disputes could come within the jurisdiction of the FAA even though the subject contract was not for the interstate shipment of goods but only where it related to interstate commerce. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Following *Prima Paint*, a number of cases held that employment contracts which did not involve the interstate shipment of goods were controlled by the FAA.[8] As a result of the ever-expanding scope of the FAA, a general principle evolved which underlies the factual determination of when a contract evidences a transaction involving commerce. One of the earliest decisions to announce this principle was *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382 (2nd Cir., 1961) cert. denied, 368 U.S. 817 (1961). In *Metro*, Chief Judge Lumbard in his concurring opinion determined that a contract by a Connecticut and New Jersey

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affirmed, 486 F. 2d 1394 (2nd Cir., 1973); *McElwee-Courbis Const. Co. v. Rife*, 133 F. Supp. 790 (D.C., P.A., 1955); *Sterling Foundations v. Merritt-Chapman & Scott Corp.*, 134 F. Supp. 327 (D.C. N.Y., 1955); *E. I. Du Pont De Nemours & Co. v. Lyles & Lang Const. Co.*, 219 F. 2d 328, cert. denied 349 U.S. 956 (1955); *Warren Bros. Co. v. Community Building Corp. of Atlanta, Inc.*, 386 F. Supp. 656 (D.C. N.C., 1974); *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F. 2d 711 (7th Cir., 1967); *Monte v. Southern Delaware County Authority*, 321 F. 2d 870 (3rd Cir., 1963); *Electronic & Missle Facilities, Inc. v. United States*, 306 F. 2d 554 (5th Cir., 1962), Reviewed on other grounds, 374 U.S. 167 (1963).

[8] *GAF Corp. v. Werner*, 485 N.E. 2d 977 (N.Y. App. Ct., 1985), cert. denied 475 U.S. 1083 (1986); *Tonetti v. Shirley*, 173 Cal. App. 3d 1144 (4th Dist., 1985); *Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208 (2nd Cir., 1973); *Dickstein v. duPont*, 320 F. Supp. 150 (D.C., Mass., 1970) affirmed 443 F. 2d 783 (1st Cir., 1971).

corporation to paint certain buildings in Florida did evidence a transaction involving commerce. In reaching this conclusion, Judge Lumbard observed:

> "The language of § 2 of the Arbitration Act might suggest that the test to be applied is a formalistic one. The statute does not purport to affect arbitration provisions in all contracts involving commerce; it puts its stamp only on such provisions when incorporated in contracts *evidencing a transaction* involving commerce. Were it not for the broad remedial purpose of the statute and for contrary indications in the legislative history, we might be justified in limiting the effect of the act to only those contracts which, on their face, reveal that some interstate transaction is to take place . . .
>
> The significant question, therefore, is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity." *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382, 387 (2nd Cir., 1961).

The decision in *Metro* enunciating the test of whether the parties contemplated substantial interstate activity was adopted by the North Carolina Court in *Burke County Public Schools Board of Education v. Shaver*, 303 N.C. 408, 279 S.E. 2d 816 (1981). In *Burke*, the Court, using the test enunciated in *Metro*, found a contract for the construction of a school building between a multi-state architectural firm and local Indiana school boards contemplated substantial interstate activity so as to be governed by the FAA. After quoting Judge Lumbard in *Metro*, with approval, the Court stated:

> "We do not mean to suggest that where the contracting parties are merely located in different states or where other facts tending only to show diversity of citizenship are present, the contract must necessarily be found to contemplate substantial interstate activity so as to trigger the act's applicability. Where, however, performance of the contract itself necessarily involves, so that the parties to the agreement must have contemplated substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act." *Burke County Public Schools Board of Education v. Shaver*, 279 S.E. 2d 816, 822 (1981).[9]

This decision was subsequently followed in North Carolina in *Paramore v. Inter-Regional Fin. Group Leasing*, 316 S.E. 2d 90 (N.C. App., 1984), where the court held that a dispute concerning a tractor leased by the Plaintiff from the Defendant was not governed by the FAA because performance under the contract did not involve substantial interstate activity even though the rental payments were received by the Defendant at its out of state office. See also *Cahoon v. Ziman*, 298 S.E. 2d 729 (N.C. App., 1983), review denied, 301 S.E. 2d 388 (N.C., 1983).

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[9] In footnote number eleven in *Burke County Public School Board of Education v. Shaver*, the North Carolina Supreme Court quoting Judge Lumbard's analysis observed "We note further that the Federal Arbitration Act unlike other statutes involving the commerce power does not attempt to regulate activity affecting interstate commerce. Instead, it provides for those who so desire and expeditious quasi-judicial process for settling disputes . . . " *Burke County Public School Board of Education v. Shaver*, 279 S.E. 2d 816, 820 (1981).

The Florida Court in *Riverfront Properties, Ltd. v. Max Factor III*, 460 So. 2d 948 (Fla App., 2nd Dist. 1984) also cited Judge Lumbard's analysis, with approval, in determining that a joint venture agreement executed in California and to be substantially performed there was not a contract evidencing a transaction in commerce. Thus, the Court concluded that the FAA did not apply even though the financing of the joint venture was obtained from a Florida lending institution.

The Respondents submit that the foregoing test enunciated by Judge Lumbard has been implicitly recognized, if not clearly stated, in almost every reported case dealing with the scope of the FAA. The Courts have uniformly applied the FAA only where the parties have contemplated substantial interstate activity.[10] Nevertheless, Petitioners assert that *Perry v. Thomas*, 482 U.S. 483 (1987) stands for the proposition that the affecting commerce standard used in determining the extent of Congress' power under the commerce clause is identical to the scope of the FAA. *Perry v. Thomas* involved a dispute with a national brokerage company over commissions from the sale of securities. The issue of whether a contract involving the sale of securities is a contract evidencing a transaction involving commerce was not seriously contested. By this time it was well settled that transactions involving the purchase and sale of securities on the national exchanges constituted commerce within the meaning of

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[10] The cases generally can be grouped into four categories: (1) Employment agreements; (2) merchant contracts involving interstate shipping; (3) contracts involving securities; and (4) construction contracts. See *Commerce*, Federal Practice Digest, 3rd Ed., key 80.5.

the FAA. See *Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F. Supp. 21 (E.D., Cal., 1974); *Stokes v. Merrill Lynch Pierce Fenner & Smith*, 523 F. 2d 433 (6th Cir., 1975); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104 (N. Dist. Ill., 1980). However, in *Perry v. Thomas* the principal issue confronting the court was whether the FAA pre-empted California state law on the subject of arbitration. In holding that state law was preempted by the FAA, the court observed that it was "Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the commerce clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987). The court was not saying that the FAA's jurisdiction was identical with Congress' authority under the commerce clause. Rather, in the context of the issue of preemption, the court was noting that Congress' authority is supreme in those matters involving interstate commerce. Furthermore, if a transaction is governed by the FAA, then pursuant to Congress' authority under the commerce clause, state law is preempted. It is important to recognize in Perry that the court was focusing on the preemption of state law and was not attempting to establish or overrule any existing precedent on what type of contracts evidence a transaction in commerce so as to be governed by the FAA.

Petitioner further argues that since Congress has the power under the commerce clause to pass an arbitration act applicable to cases such as the present case, then it necessarily follows that the FAA applies to the present transaction. (Petitioner's brief, p. 9). The Respondents do not contest Petitioner's assertion that Congress has the authority under the commerce clause to adopt arbitration

laws applicable to intrastate consumer purchases involving residents of the same state where the goods purchased have some nexus with interstate commerce. In fact, as Petitioner points out in his brief, the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1981, et seq., and the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. § 230 et seq., are appropriate examples of the exercise of Congress' authority. However, it does not follow that Congress intended for the FAA to apply to intrastate consumer sales simply because they may have the authority to adopt such a law. If Congress determines that the automobile dealer associations and other retailers need protection from consumers, there is no doubt it could make the appropriate legislative findings and enact statutory protections. However, the issue presented here is whether Congress intended for § 2 of the FAA to apply to contracts of adhesion where a consumer purchases a product from a retailer residing in the same state. The legislative history as previously stated, not only militates against such an unwarranted expansion of the Act, but it clearly indicates that such was not Congress' intent.

Not only have the courts consistently required more than the "affecting commerce standard" advocated by Petitioner, this standard was specifically repudiated by Judge Lumbard in *Metro*, where he stated:

> "Notwithstanding the finding in *Lawrence* that 'Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements,' the legislative history of the Arbitration Act of 1925 reveals little awareness on the part of Congress that state law might be affected. See *Note*, 69

> Yale L.J. 847, 863 (1960). Having no clear mandate from Congress as to the extent to which state statutes and decisions are to be superceded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy if not the Constitution would reserve to the states. It may be a close constitutional question indeed whether Congress could regulate arbitration provisions in all contracts 'affecting commerce' or between persons 'engaged in commerce' as these phrases have been defined by countless cases under the National Relations Act § 10(a), 29 U.S.C.A. § 160(a), or the Fair Labor Standards Act, §§ 6(a), 7(a), 29 U.S.C.A §§ 206(a), 207(a)." *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382, 386 (1961).

The Petitioner further attacks Judge Lumbard's test requiring that the parties contemplate substantial interstate activity in performing their contract as being subjective and, thus, hinders the policies behind promoting arbitration. This analysis reflects Petitioner's confusion over how the standard is applied by the court. The terms of the contract are the primary evidence in determining whether the parties contemplated substantial interstate activity. As noted by Judge Lumbard:

> "Cogent evidence regarding their state of mind at the time would be the terms of the contract and if it on its face evidences interstate traffic, such as did the shipment from New York to Massachusetts in the *Lawrence* case, the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated." *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F. 2d 382, 387 (1961).

Such an analysis is far less subjective than the approach advanced by Petitioner. The Petitioner would, in effect, abandon any test or standard in applying the FAA. If any remote nexus to interstate commerce could be developed, the Petitioner would argue that the FAA would control. Thus, as a practical matter, all consumer purchases would be affected since the majority of products bought and sold within a given state are manufactured elsewhere or at least packaged using materials or equipment from another state or country. Almost any contract which requires the use of tools, equipment or instruments in its performance, regardless of the remoteness to interstate commerce, would be governed by the FAA since in all likelihood such tools and equipment would be manufactured in another state. In the final analysis, Petitioners would use the FAA to usurp consumer protection laws and state contract laws irrespective of the adhesion nature of the agreement and the remoteness to interstate commerce. The present case is a typical example of Petitioner's argument taken to its logical conclusion. If an Alabama resident who purchases a motor vehicle for consumer use from another Alabama resident under an adhesion contract is required to arbitrate under the FAA, then consumer protection laws in every state are in peril. It is certain that Congress did not intend this perverted application of the FAA and neither has this court nor any other court to date applied the Act in such a fashion. In this regard, it is interesting to note that Petitioner fails to cite a single case in its brief with facts similar to the case at bar. The reason for this glaring omission is that neither Congress, the courts, nor even parties to private agreements, ever considered that the

FAA was intended to apply in such transactions. The Respondents submit that such legislation should be undertaken by Congress or State Legislatures only after careful consideration of the consequences to consumer rights.

CONCLUSION

For the reasons set forth above, the Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

WILLIAM J. TRUSSELL
Attorney for Respondents

CHURCH, TRUSSELL & ROBINSON, P.C.
1609 Cogswell Avenue
Pell City, Alabama 35125
(205) 338-2295